IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

CRL.A.No. 863 of 1998(C)

CC.183/1993 of JUDL. MAGISTRATE OF FIRST CLASS COURT, IRINJALAKUDA
CRL.A.NO.228/1995 of SESSIONS COURT, THRISSUR

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APPELLANT:

K.L.POLY, S/O.LALATH LONAPPAN,
RESIDING AT KALATH HOUSE,
NELLAI P.O.,
THRISSUR DISTRICT.

BY ADV. SRI.K.DIVAKARAN NAIR
SRI.THOMAS VELLAPPALLY

RESPONDENTS:

1. SUNNY, S/O.KAKKASSERI THOMAS,
PROPRIETOR, KALAN DRUGS & REMEDIES,
PARAPPUKKARA VILLAGE,
MUKUNDAPURAM TALUK.

2. STATE OF KERALA.

BY ADV. SRI.SAIGI JACOB PALATTY
SRI.K.RAMACHANDRAN FOR R1
PUBLIC PROSECUTOR, SRI C.K.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON 16/10/2007 DELIVERED THE FOLLOWING:

K.R.UDAYABHANU, J.

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Crl.A.No.863/1998-D

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Dated this the 16th day of October, 2007

J U D G M E N T

The appellant is the complainant in C.C.No.183/1993 in the file of the Judicial Magistrate of the First Class, Irinjalakuda, with respect to the offence under Section 500 of the Indian Penal Code. Although the trial court convicted the accused, the appellate court reversed the finding, which is disputed herein.

2. The case of the complainant/prosecution is that the accused caused a lawyer notice sent to various dealers of the Ayurvedic medicines manufactured by the complainant alleging that the complainant is manufacturing and marketing those medicines without licence. The dealers are also warned of the consequences of selling the medicines of the complainant. The trial court had convicted the accused and sentenced to undergo rigorous imprisonment for a period of one year. As noted above, the appellate court acquitted the accused.

3. The evidence adduced in the matter consisted of the testimony of PWs.1 to 4 and Exts.P1 to P5. PW.1 is the complainant, PW.3 is the Deputy Drugs Controller (Ayurvedic), who has testified as to the

existence of the licence on the part of the complainant, PW.4 is the Advocate, who issued the impugned notice (Ext.P5) to the dealer. He has just proved that the notice was sent as per the instruction of the accused. It was found by the appellate court as well, that the accused is not entitled to the protection of exceptions 1 and 9 of Section 499 I.P.C, as it was not brought out that the accused could establish that the allegations in Ext.P5 notice are true or even substantially true or that he has made any enquiry regarding the truth of it. It was on the basis of absence of evidence as to the publication which is the most essential element of the offence under Section 499 I.P.C that the accused was acquitted. It is the contention of the appellant/complainant that the findings of the appellate court is totally erroneous, as Ext.P5 being a notice sent by registered post with acknowledgement due to M/s.Sakthi Medicals, Chalakudy P.O., there is a presumption under Section 114(f) of the Indian Evidence Act that the addressee has received it. Hence, according to him, evidently, the addressee has opened it, read it and then transmitted it to the complainant. It is pointed out that Ext.P5 notice is an opened form and hence, it is to be treated as having been read by the addressee and hence, publication contemplated is proved. The appellate court noted that Ext.P5 is a photocopy of the notice signed by PW.4 the Advocate and that Ext.P5 would not show to whom actually

it was sent. It merely describes the addressee as M/s.Sakthi Medicals. It was noted that there was no mention in the complaint as to how Ext.P5 reached the complainant. The court has noted that the maximum that could be presumed is that Ext.P5 was sent to M/s.Sakthi Medicals, Chalakudy, by registered post. It was pointed out that no body was examined from M/s.Sakthi Medicals to show that Ext.P5 was received by somebody and read. The court has also relied on various decisions in this regard.

4. In the instant case, I find that the evidence of PW.1 and the averments in the complaint are hardly sufficient to establish publication. PW.1 has just stated that somebody had sent lawyer notices to his dealers alleging that the medicines are manufactured by the complainant without licence and that was why the rate of selling his medicines got reduced. It was when the sale of medicines had gone down that he inquired with the dealers and came to know of the lawyer notices received by them. In fact, it is only in the cross-examination that he has stated that the customers after receiving lawyer notices contacted him over telephone. He has stated that it is one Kaithakam Stores, Kottayam and Kalan Agency from Kannoor, who contacted him over telephone and the others through letters. The above letters were

not produced. Evidently, PW.1 has not testified anything with respect to the receipt of the impugned notice by anybody at M/s.Sakthi Medicals at Chalakudy which is the required inevitable publication in the matter.

5. As pointed out by the counsel for the respondent that the contents if known to the lawyers or the clerks etc. of the respective sides, would not amount to publication in view of the privilege involved as held in **Ramakrishnan v.Subbarama Sastrigal** (**1986 KLT 1361); Kader v. Fousia [1989 (2) KLT 696].** Only if another person other than the parties involved comes to know of the contents it can be said that there is publication: **S.K.Sundaram: In re [(2001) 2 SCC 171]; In re, Bhulliram Jalam [AIR 1962 Madhya Pradesh 382].**

Here is a case that even the evidence of PW.1 complainant did not contain details as to the person who came to know of the contents of Ext.P5 notice. In the circumstances, I find that no interference in the order of the lower appellate court is called for. The criminal appeal is dismissed.

K.R.UDAYABHANU,
Judge

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K.R.UDAYABHANU, J.

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Crl.A.No.863/1998-D

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16th October, 2007